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ENG SONG ALUMINIUM INDUSTRIES SDN BHD v. KEAT SIONG PROPERTY SDN BHD

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
ABDUL RAHMAN SEBLI JCA
B ZALEHA YUSOF JCA
[CIVIL APPEAL NO: J-02(IM)(NCVC)-2240-12-2016]
17 APRIL 2018

C ***CONTRACT:*** *Agreement – Sale and purchase agreement – Subject to contract – Approval of State Authority – Appellant refused to continue with sale and purchase and tenancy agreement after months of negotiations and payment of deposit – Summary judgment – Specific performance – Application under O. 81 of Rules of Court 2012 – Whether there was a concluded contract – Whether specific performance under O. 81 of Rules of Court 2012 could be granted in a sale and*
D *purchase agreement subject to condition precedent*

The appellant was the registered owner of a piece of land (the 'property'). There was a restriction of interest on the property that it could not be sold, leased or transferred without the approval or consent of State Authority. By a letter dated 15 September 2015, the respondent made an offer to the
E appellant to buy the property for RM3,800,000 and upon completion of the sale, to rent it back to the appellant to enable the appellant to continuously occupy the property. On 17 September 2015, the respondent paid earnest deposit to the appellant in the sum of RM76,000 being 2% of the purchase price. Their correspondences were issued with a term 'subject to contract'
F and also 'there shall be no binding contract between the parties until formal agreements are executed'. On 10 May 2016, after eight months of negotiations, the appellant forwarded to the respondent two copies of the forms for the State Authorities' approval to enable the appellant to proceed to apply for the said approval. The respondent then forwarded to the
G appellant the executed sale and purchase agreement and tenancy agreement together with the sum of RM190,000 being balance of deposit sum. However, the appellant returned to the respondent all the documents together with the deposit cheque without executing the agreements and without giving any reason. The respondent thus filed a writ of summons for specific
H performance against the appellant. However, before the defence was filed, this notice of application was filed for summary judgment under O. 81 of the Rules of Court 2012 ('ROC'). The Judicial Commissioner ('JC') allowed the application, hence the present appeal. The issues that arose for determination were (i) whether there was a concluded contract between the parties; (ii) whether a specific performance under O. 81 of the ROC could be granted
I in a sale and purchase agreement which was subject to a condition precedent *ie*, the State Authority's consent; and (iii) whether the respondent's application under O. 81 of the ROC was flawed for failing to set out the minutes of judgment sought pursuant to O. 81 r. 2 of the ROC.

Held (dismissing appeal with costs)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) In order to determine whether there was a concluded contract between the parties, the ingredients of a contract must be present. There must be offer, acceptance, consideration, intention to create legal relations, the capacity of parties as well as certainty of subject matter involved. When the arrangement was 'subject to contract', the court could always scrutinise the correspondence between the parties to construe whether the contract had finally been made. In this instant case, the length of period of negotiations which took place for about eight months, would indicate the intention and seriousness of the parties to conclude the sale and purchase agreement as well as the tenancy agreement. All the elements of a binding contract were already there. The parties, the property, the price and the terms had been identified with sufficient certainty. In the circumstances, a valid and enforceable contract had materialised between the parties. (paras 20, 21 & 23)

(2) Section 17 of the Specific Relief Act 1950 was not the authority that could strengthen the appellant's argument. A condition precedent in a contract was not an impediment for an order of specific performance to be granted. It was merely a conditional contract which would no longer be conditional if the conditions precedent had been fulfilled. The respondent herein was just seeking the appellant to comply and continue with the agreements and to apply for the State Authority's approval. In the event the State Authority refused to give its approval, the contract should surely come to an end. (paras 29 & 33)

(3) The respondent had sufficiently set out the reliefs of the judgment sought which were supported by the affidavit containing all the documents and details of the parties' obligation under the agreement. The respondent was merely seeking that the appellant continued with the execution of the agreement and applied for the State Authority's approval. The prayer of the notice of application allowed the respondent to seek further order, if need be. Therefore, this was not a case where the respondent 'has put it into the hands of the court how the contract is to be carried out'. In the premises, there was no merit in this appeal. (paras 40 & 42)

Bahasa Malaysia *Headnotes*

Perayu adalah pemilik berdaftar sebidang tanah ('hartanah'). Terdapat sekatan ke atas hartanah bahawa ia tidak boleh dijual, disewakan atau dipindahkan tanpa kelulusan atau persetujuan Pihak Berkuasa Negeri. Dengan surat bertarikh 15 September 2015, responden membuat tawaran kepada perayu untuk membeli hartanah dengan harga RM3,800,000 dan setelah selesai penjualan tersebut, menyewakannya kepada perayu untuk membolehkan perayu terus menduduki hartanah. Pada 17 September 2015, responden membayar deposit kepada perayu dengan jumlah RM76,000 yang merupakan 2% daripada harga belian. Surat-menyurat mereka dikeluarkan

dengan terma 'tertakluk kepada kontrak' dan juga 'tidak akan ada kontrak mengikat antara pihak-pihak sehingga perjanjian rasmi dimeterai'. Pada 10 Mei 2016, selepas lapan bulan rundingan, perayu mengemukakan kepada responden dua salinan borang untuk kelulusan Pihak Berkuasa Negeri untuk membolehkan perayu meneruskan permohonan untuk kelulusan tersebut. Responden kemudian mengemukakan kepada perayu perjanjian jual beli dan perjanjian sewa yang dimeterai dengan jumlah sebanyak RM190,000 yang merupakan baki jumlah deposit. Bagaimanapun, perayu mengembalikan kepada responden semua dokumen bersama dengan cek deposit tanpa memeterai perjanjian dan tanpa memberi apa-apa alasan. Oleh itu, responden memfailkan writ saman untuk pelaksanaan spesifik terhadap perayu. Walau bagaimanapun, sebelum pembelaan difailkan, notis permohonan ini difailkan untuk penghakiman terus bawah A. 81 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Pesuruhjaya Kehakiman ('PK') membenarkan permohonan tersebut, oleh itu rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada terdapat kontrak yang diselesaikan antara pihak-pihak; (ii) sama ada pelaksanaan spesifik di bawah A. 81 KKM boleh diberikan dalam perjanjian jual beli yang tertakluk kepada syarat terdahulu iaitu persetujuan Pihak Berkuasa Negeri; dan (iii) sama ada permohonan responden di bawah A. 81 KKM cacat kerana gagal menetapkan minit penghakiman yang diminta menurut A. 81 k. 2 KKM.

Diputuskan (menolak rayuan dengan kos)
Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:

(1) Untuk menentukan sama ada terdapat kontrak yang dimeterai antara pihak-pihak, inti pati-inti pati kontrak harus wujud. Harus adanya tawaran, penerimaan, pertimbangan, niat untuk mewujudkan hubungan perundangan, keupayaan pihak-pihak serta kepastian mengenai perkara yang terlibat. Apabila pengaturan adalah 'tertakluk kepada kontrak', mahkamah sentiasa boleh meneliti surat-menyurat antara pihak-pihak untuk membuktikan sama ada kontrak akhirnya dibuat. Dalam kes ini, panjang tempoh rundingan yang berlaku selama kira-kira lapan bulan, akan menunjukkan niat dan kesungguhan pihak-pihak untuk menyimpulkan perjanjian jual beli serta perjanjian sewa. Kesemua inti pati-inti pati kontrak mengikat sudah wujud. Pihak-pihak, hartanah, harga dan syarat-syarat telah dikenal pasti dengan kepastian yang mencukupi. Dalam keadaan ini, kontrak yang sah dan boleh dikuatkuasakan telah wujud antara pihak-pihak.

(2) Seksyen 17 Akta Relief Spesifik 1950 bukanlah autoriti yang boleh menguatkan hujahan perayu. Syarat terdahulu dalam kontrak bukan merupakan halangan bagi suatu perintah pelaksanaan spesifik diberikan. Ia hanyalah kontrak bersyarat yang tidak akan bersyarat jika syarat terdahulu dipenuhi. Responden di sini hanya memohon perayu untuk mematuhi dan meneruskan perjanjian dan memohon kelulusan Pihak Berkuasa Negeri. Sekiranya Pihak Berkuasa Negeri enggan memberikan kelulusannya, kontrak mestilah berakhir.

(3) Responden telah mengemukakan secara secukupnya relif penghakiman yang dipohon dan disokong oleh afidavit yang mengandungi semua dokumen dan butir-butir kewajipan pihak-pihak di bawah perjanjian. Responden hanya memohon pada perayu untuk meneruskan pelaksanaan perjanjian dan memohon kelulusan Pihak Berkuasa Negeri. Permohonan dalam notis permohonan membenarkan responden memohon perintah selanjutnya, jika perlu. Oleh itu, ini bukan satu kes di mana responden 'memberikan kuasa kepada mahkamah untuk menentukan bagaimana kontrak itu perlu dilaksanakan'. Oleh itu, tiada merit dalam rayuan ini.

Case(s) referred to:

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Chin Tai v. Siow Shiow & Ors [1970] 1 LNS 15 FC ***(refd)***
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***
Dato' Yeoh Kian Hin v. Wijaya Astana Sdn Bhd & Ors [2002] 1 CLJ 68 HC ***(refd)***
Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor [2015] 8 CLJ 1068 FC ***(refd)***
Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors And Other Appeals [2003] 4 CLJ 505 CA ***(refd)***
Halimah Abdul Rahman v. Fatimah Abdullah [1976] 1 LNS 38 FC ***(refd)***
Masters v. Cameron [1954] 91 CLR 353 ***(refd)***
Mawar Awal (M) Sdn Bhd v. Kepong Management Sdn Bhd & Anor [2005] 7 CLJ 296 HC ***(refd)***
MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd [2010] 1 CLJ 36 CA ***(refd)***
Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia [2000] 3 CLJ 313 CA ***(refd)***
Saudagar Singh v. Nazeer [1978] 3 AUER 817 ***(refd)***
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 2 r. 1, O. 14, O. 81 r. 2
Specific Relief Act 1950, s. 17(a), (b)

The Specific Relief Act 1963 [India], s. 13(1)(a), (b)

For the appelant - Yoong How Kiat; M/s HK Yoong
For the respondent - R Vasanthan; M/s Julie Lim, Vasanthan & Co

[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit JA-22NCVC-128-06-2016 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Zaleha Yusof JCA:

[1] This is an appeal against the decision of the High Court at Johor Bahru which had on 26 October 2016 allowed the respondent's notice of application for an order for specific performance pursuant to O. 81 of the Rules of Court 2012.

[2] The subject matter of this appeal is a piece of land held under HS(D) 460660 PTD 4036 Mukim Sungai Tiram, Daerah Johor Bahru, Johor (the property). The appellant is the registered owner of the property. There is a restriction of interest on the property that it cannot be sold, leased or transferred without the approval or consent of State Authority; and both parties, the plaintiff and the defendant, were aware of this restriction.

[3] By a letter dated 15 September 2015, the respondent made an offer to the appellant to buy the property for RM3,800,00 and upon completion of the sale, to rent it back to the appellant to enable the appellant to continuously occupy the property.

[4] On 17 September 2015, the respondent paid earnest deposit to the appellant in the sum of RM76,000 being 2% of the purchase price.

[5] All these were done through their respective solicitors and their correspondences were issued with a term "subject to contract" and also "there shall be no binding contract between the parties until formal agreements are executed".

[6] On 10 May 2016, after eight months of negotiations, the appellant's solicitor forwarded to the respondent's solicitor two copies of the forms for the State Authorities' approval to enable the appellant to proceed to apply for the said approval. In the same letter, the appellant also requested the respondent to furnish all other relevant documents for the purpose of the said application for approval.

[7] On 11 May 2016, the appellant's solicitor had emailed the respondent's solicitor which *inter alia* contained the following:

> We have no further comment on the SPA and TA draft. Kindly proceed to engross of the same, for your client's kind execution. Please let us have the SPA and TA duly executed by your client together with the Balance Deposit.

[8] The respondent's solicitor had duly complied with the appellant's solicitor's letter and on 13 May 2016 had forwarded the following documents to the appellant's solicitor:

(i) Four copies of the sale and purchase agreement duly executed by the respondent;

(ii) Four copies of the tenancy agreement duly executed by the respondent;

(iii) Two copies of the memorandum of transfer duly signed and sealed by the respondent;

(iv) Application forms for the State Authority's approval; and

(v) Respondent's cheque No. 310540 dated 13 May 2016 for the sum of RM190,000 being balance of deposit sum.

[9] However, on 20 May 2016, the appellant had through their solicitor returned to the respondent's solicitor all those documents together with the deposit cheque without executing the agreements and without giving any reason.

[10] Following that, the respondent filed a writ of summons for specific performance against the appellant in this suit. However, before the defence was filed, this notice of application was filed for summary judgment under O. 81 of the Rules of Court 2012. The learned Judicial Commissioner had allowed the application, hence the appeal before us. After perusing the records of appeal and considering the written as well as oral submissions of learned counsel for the appellant and the respondent, we had unanimously dismissed the appeal. We shall now give our reasons.

Issues

(a) Whether there was a concluded contract between the parties;

(b) Whether a specific performance under O. 81 of the Rules of Court can be granted in a sale and purchase agreement which is subject to a condition precedent ie, the State Authority's consent; and

(c) Whether the respondent's application under O. 81 was fatally flawed for failing to set out or attach thereto minutes of judgment sought pursuant to O. 81 r. 2 of the Rules of Court 2012.

Our Deliberations And Decision

[11] First, we bore in mind that this application which was made under O. 81 of the Rules of Court 2012 had the same procedural objective as O. 14 of the same Rules in that it provides for a speedy mechanism for obtaining summary judgment without proceeding to a trial. See *Mawar Awal (M) Sdn Bhd v. Kepong Management Sdn Bhd & Anor* [2005] 7 CLJ 296; [2005] 6 MLJ 132 at p. 140. Hence, the court needs to be satisfied that there is no triable issue before the application can be allowed.

[12] So, based on the three issues raised, is there anything which needs to be ventilated in a full trial?

[13] We examined all those three issues. On the first issue, it was contended on behalf of the appellant that there was no concluded contract between the appellant and the respondent as the parties had both stated at the outset "unless and until all terms and condition shall be agreed and the formal sale and purchase agreement and tenancy agreement executed by the parties thereto, there shall be no concluded and binding contract for the same."

[14] Learned counsel for the appellant cited the case of *Masters v. Cameron* (1950) 91 CLR 353 which was referred to by the Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 at p. 633 as follows:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or implied, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution.
>
> Meaning no disrespect to Counsel, we consider the applicable principle to be capable of statement in far simpler terms than he has sought to do. An agreement to make an agreement does not result in a contract. It is for the Court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the Court reaches an opposite conclusion, then there is an enforceable contract.

[15] Learned counsel also cited the more recent decision of the Federal Court in *Deutsche Bank (Malaysia) Bhd. v. MBf Holdings Bhd & Anor* [2015] 8 CLJ 1068 at pp. 1085 and 1100, which explained authorities "subject to contract" cases *inter alia* as follows:

> [20] But *consensus ad idem* on the terms alone is not enough to form a binding contract. "... in order for a promise to be legally enforceable as a contract, it must be intended to be legally binding, or, as it is more often put, the parties must intend to enter into legal relations ... the earliest judicial support for such a requirement in case law is in the judgment of Atkin LJ in *Balfour v. Balfour* [1919] 2 KB 571 ... (*Butterworths Common Law Series, The Law of Contract* 3rd edn at para. 2.169). "The requirement of an intention to create legal relations, additional to the test of bargain, has been repeatedly criticised by academic commentators" (see *B.A. Hepple* [1970] 28(1) CLJ 122 at 127; see also *A. W. B. Simpson* [1975] 91 LQR 247 at 263-265). But "since the later nineteenth century, it has become common to say that in addition to the existence of an agreement (generally established through offer and acceptance) and consideration, the formation of an informal contract requires evidence of an "intention to create legal relations" - that is, there is a substantive additional

requirement that the parties intended their agreement to have legally binding force ... Each party agrees not only to the terms of the contract but agrees to it being a contract" (*Formation and Variation of Contracts* by Cartwright at p. 55). When parties enter into it, there must be an intention to create legal relations (see *RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14; see also *Hui Jia Hao v. Perdana Park City Sdn Bhd & Anor* [2011] 1 LNS 595; [2012] 8 MLJ 385; *Anuiti Enterprise (M) Sdn Bhd v. Cubic Electronics Sdn Bhd* [2006] 1 LNS 288; [2006] 6 MLJ 56; *Ahmad Zaini Japar v. TL Offshore Sdn Bhd* [2002] 5 CLJ 201; [2002] 7 MLJ 604; *Jone Theseira v. Eileen Tan Ee Lian & Anor* [2003] 5 CLJ 171; [2002] 4 MLJ 629) or in circumstances in which such an intention must be ascribed to them (*Beesley v. Hallwood Estates Ltd* [1960] 1 WLR 549, at 558; see also *Sutton and Shannon on Contracts*, 6th edn at p. 54).

...

...

...

[47] To sum up, without *consensus ad idem*, there is no concluded contract. But *consensus ad idem* on just the terms is not enough to form a concluded contract. In addition, there must be the intention to create legal relations and consideration. In most commercial agreements, the court will presume that intention (see *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer*, by John Cartwright at p. 140), unless there is proof of no such intention. Formality is the exception and not the rule. It does not follow that just because of the expression "subject to contract" there is no concluded contract. But if formality is by choice, it should be made clear that parties are not bound until the execution of a formal agreement. "... if the intention were that what was agreed in the first instance should be the subject to the completion of the formal document, then there was no bargain while that condition remain unfulfilled. Also, of course, there was no agreement if the parties had not agreed on a set of terms at all, either absolutely or conditionally" (*Love and Stewart Ltd v. S Instone and Co Ltd* [1917] per Lord Loreburn).

[16] Learned counsel for the respondent, although did not deny the issuance of the letters with the term "subject to contract" however submitted that the letters were issued so as to enable the parties to finalise all the terms and conditions of both the sale and purchase and tenancy agreements. They were issued with such terms and with an honest intention that neither party shall take an advantage of the other until terms and conditions of the sale and purchase and tenancy agreements are finalised. Hence, the said terms were only intended for parties to finalise the terms and conditions of the agreements and it is not terms to be incorporated into those agreements.

[17] He further submitted that what was important was the email dated 11 May 2016 which we had reproduced above. By asking the respondent's solicitor to engross the sale and purchase and tenancy agreements, it was confirmed that all the terms and conditions of both the agreements had mutually crystallised and there was nothing more to add into the terms and conditions of the agreements.

[18] The respondent further submitted that all the essential ingredients to form a valid and enforceable contract had been reached, as follows:

(i) There was an offer and acceptance between the parties for the purchase of the property and the tenancy agreement;

(ii) Consideration of RM3,800,000 as purchase price had been agreed by the parties;

(iii) All the terms and conditions of the tenancy agreement together with payment of rental between the parties had been concluded;

(iv) The parties had the intention to create a legal relationship to execute the agreements.

[19] As such, there was a certainty of parties, certainty of price, certainty of property and intention to create a legal relationship. The appellant was fully aware and that there was nothing more to add into the terms and conditions of the agreements hence, had instructed their solicitors to forward the agreements duly executed by the respondent together with balance deposit sum.

[20] Having heard their submissions on the first issue, we were mindful that in order to determine whether there was a concluded contract between the parties, the ingredients of a contract must be present. There must be offer, acceptance, consideration, intention to create legal relation, the capacity of parties as well as certainty of subject matter involved. We were of the view, when the arrangement is 'subject to contract' such as in the instant case, the court can always scrutinise the correspondence between the parties to construe whether the contract had finally been made.

[21] As pointed out by the Federal Court in *Charles Grenier*, *supra*, it is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. In this instant case, the length of period of negotiations which took place for about eight months, in our view, would indicate the intention and seriousness of the parties to conclude the sale and purchase agreement as well as the tenancy agreement. Their months of negotiations culminating in the email dated 11 May 2016 had finally concluded all the terms and their intention to complete the sale and purchase and the tenancy agreements. We therefore agreed with learned counsel for the respondent that all the elements of a binding contract were already there. The parties, the property, the price and the terms had been identified with sufficient certainty. See the decision of this court in *Sandrifarm Sdn Bhd v. Pegawai Pemegang Harta Malaysia* [2000] 3 CLJ 313; [2000] 2 MLJ 535.

[22] This court in *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746 had *inter alia* held:

> (1) (per Gopal Sri Ram JCA) There was a concluded contract despite the want of a duly executed formal agreement. There was an offer by the defendant, it had been accepted by the plaintiff. There was consideration.

There was also certainty of parties, certainty of price and certainty of the property. There were the unequivocal acts of part performance by the plaintiff in the payment of the deposit coupled with the RM5,000 meant for the squatters: *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625; [1996] 3 MLJ 327 followed. There can be a concluded contract even where the parties contemplate the execution of a more formal document: *Rossiter v. Miller* [1878] 3 App Cas 1124 and *G Percy Trentham Ltd v. Archital Luxfer Ltd* [1993] 1 LIoyd's Rep 25 followed (see paras 7, 9).

[23] So with this instance. The offer and acceptance were there. Parties had agreed with the consideration of RM3,800,000. The price, the parties, the property had all been ascertained. The terms and conditions had been agreed upon. Even the appellant's solicitor in their email of 11 May 2016 had stated they had "no further comment on the SPA and TA draft". This moral conduct of the appellant was, in our view, relevant in determining the issue at hand. So there was clearly nothing more to be added. Hence we agreed with learned counsel for the respondent that in the circumstances, a valid and enforceable contract had materialised between the parties. Thus our answer to the first issue was in the affirmative.

[24] Next is the second issue namely whether specific performance can be granted when the contract is subject to a condition precedent ie, the State Authority's consent.

[25] Learned counsel for the appellant submitted that an order for specific performance can only be granted if there is a certainty that the State Authority's consent can be obtained. In this instant case, he argued, the State Authority's consent is not obtainable as of right. Therefore there is no certainty and this issue becomes at least a triable point of law. He argued that the agreement cannot be specifically enforced because "specific performance means performance is certainty" and cited sub-ss. 17(a) and (b) of the Specific Relief Act 1950 (SRA) to support the argument.

[26] Learned counsel for the respondent however submitted that there were many authorities where our apex court had ordered specific performance in cases of land transactions which were subject to State Authority's approval. He found support in, *inter alia*, the following cases:

(i) *Chin Tai v. Siow Shiow and Ors* [1970] 1 LNS 15; [1971] 1 MLJ 67 (Federal Court);

(ii) *Halimah Abdul Rahman v. Fatimah Abdullah* [1976] 1 LNS 38; [1976] 2 MLJ 64 (Federal Court); and

(iii) *MMI Industries Sdn Bhd v. Let Sin Industries Sdn Bhd* [2010] 1 CLJ 36; [2010] 5 MLJ 71 (Court of Appeal).

[27] We had again scrutinised the submissions made by the parties. With due respect, we did not understand how sub-ss. 17(a) and (b) of the SRA would support the appellant's argument. Subsections 17(a) and (b) merely state:

A 17. Purchaser's right against vendor with imperfect title.

Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:

B (a) If the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of that interest;

(b) Where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure the
C concurrence;

[28] In India, similar provisions can be found in sub-ss. 13(1)(a) and (b) of the Indian Specific Relief Acts 1963. The Indian Supreme Court in *Waheed Baig v. Bangi Lakshmamma and Ors* on 21 April 2008 in Civil Appeal No. 1055 of 2002 at para. 10 had explained the subsections:

D 10. The section deals with rights of a purchaser in certain cases, where a person contracts to sell or let certain immovable property having no title or only an imperfect title. These rights enable the purchaser to take action when title of vender is bettered in the circumstances given in this section. The vendor is under a duty to prove his title and to convey what he has
E contracted to convey. The section gives right to purchaser in the event there is a defect in title as enumerated in Clauses (a) to (d) to compel the vendor to convey the title or to secure the concurrence or conveyance or to redeem the mortgaged etc. as the case may be.

[29] Hence, with due respect to learned counsel for the appellant, s. 17 of
F SRA is not the authority that can strengthen their argument on this issue. On the contrary, we were inclined to follow the decision of this court in *Farlim Properties Sdn Bhd v. Goh Keat Poh & Ors (And Other Appeals)* [2003] 4 CLJ 505; [2003] 4 MLJ 654 which at p. 517 (CLJ); p. 667 (MLJ) had made the following determination:

G In *Nik Mohamed Salleh v. Tengku Besar Zabidah* [1969] 1 LNS 121; [1971] 1 MLJ 73, the Federal Court held that although the beneficiaries of the deceased's estate had no title to the land which they agreed to sell under an agreement they had a *spes successionis* in the land. As such, the administrator of the deceased's estate was compelled to transfer the whole land to the purchaser, by virtue of the provisions of s. 17(a) of the
H Specific Relief (Malay States) Ordinance 1950 ('the SR (MS) Ordinance') and s. 44(1) of the Contracts (Malay States) Ordinance 1950 ('the SR (MS) Ordinance'). Section 17(a) of the SRA, which is in *pari materia* with the same section of the SR(MS) Ordinance, states:

Where a person contracts to sell or let certain property, having only
I an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this Chapter) has the following rights:

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of that interest; ...

And s. 44(1) of the Contracts Act 1950, which is similar to the same section of the D(MS) Ordinance, provides:

(1) When two or more persons make a joint promise, the promise may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise.

In *Kersah La'usin v. Sikin Menan* [1964] 1 LNS 57; [1966] 2 MLJ 20 where, under an agreement, the sole beneficiary sold the land registered under his deceased mother's name, in his judgment Raja Azlan Shah J (as His Highness was then) stated:

> The first consideration is whether the plaintiff could enter into a contract with the defendant's (deceased) father involving a subject matter which was then not subsisting in the sense that the said land was still in his mother's name. It is not disputed that he was the sole beneficiary and that he was in such a position that when the time came he could perfect the title of the purchaser. The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself as answer to a suit of specific performance by the purchaser; *Brickies v. Snell* (1916) 2 A.C. 599. Actual possession of both the legal estate and any equitable rights are not pre-requisites so long as the vendor is in such a position that when the time for completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.
>
> What is discernible from the authorities is that a beneficiary to a deceased's estate can enter into a contract of sale of land involving a subject matter which is not subsisting in the sense that the land is still in the deceased's name. However, when the beneficiary comes to be in a position to pass on the title to the purchaser he can be compelled by the purchaser to make good the contract out of that interest. Although in the present appeal, cl 1.1. of the relevant 1992 Agreements states that the sale is in respect all the rights, title and interest and shares of all the beneficiaries in the said lands, to our mind, having regard to the fact that the administration of the deceased's estate had not been completed at the time of its execution, the subject matter involved in the transaction is none other than the sale of *spes successionis*. As specific performance of the 1992 Agreements as prayed for by the plaintiff in the action is an equitable relief, the court will look at the substance rather than the form.

Thus, s. 17 of the SRA cannot be used to support a proposition a prayer for specific performance cannot be granted when there is no certainty of performances. In fact, on the contrary, in our view, the section can be used to support the respondent's claim to compel the appellant to perform its obligation under the agreements.

[30] We found in *Chin Tai*, *supra*, the restriction endorsed on the issue document of title was that the land was not to be transferred without the express permission in writing of the collector of land revenue. The Federal Court had *inter alia* held that the contract of sale was valid although there could be no transfer by way of specific performance without the permission of the collector for the transfer being obtained. It was also held that an order may be made for specific performance subject to the permission being granted; if permission is refused, however, the respondents ie, the buyer would be entitled to damages.

[31] In *Halimah binti Abdul Rahman*, *supra*, the respondent agreed to sell a piece of land which she had occupied by virtue of a "surat putus kecil" which had been cancelled; making it clear in the agreement that she was not its owner but had applied to the State for the land and promising to complete the deal after she obtained title from the State. The appellant paid RM300 towards the purchase price. The respondent had later refused to complete the sale and the appellant thereupon applied for specific performance. It was refused by the High Court on the ground that it offended the Kedah Land Enactment as the land had reverted to the State. The Federal Court, on appeal had allowed the appellant's appeal and held that the contract was clearly enforceable in law as it was a conditional sale to be completed when the vendor's application was approved by the State.

[32] In *MMI Industries*, *supra*, this court had stated that our court has on several occasions ordered specific performance in cases of land transactions where there were conditions precedent to be fulfilled by the vendor. In that case, this court allowed the appeal and granted the order for specific performance of the sale and purchase agreement which was conditional upon the approval of the State Authority of Johor.

[33] Based on those authorities, we were satisfied that a condition precedent in a contract such as in this instant case, is not an impediment for an order of specific performance to be granted. It was merely a conditional contract which will no longer be conditional if the conditions precedent have been fulfilled. The respondent herein was just seeking the appellant to comply and continue with the agreements and to apply for the State Authority's approval. In the event the State Authority refuses to give its approval, the contract shall surely come to an end.

[34] Thus our answer to the second issue was also in the affirmative.

[35] On the last issue that the respondent failed to set out or attach minutes of judgment sought pursuant to O. 81 r. 2 of the Rules of Court 2012, it was the appellant's argument that the failure of the respondent to do so would consequently make the order become imbalanced and/or without legal basis. He submitted, *inter alia*, there was no purchase price stated, there was no direction for the respondent to make payment and the time limit for payment

and there was also no direction for the appellant to pay real property gains tax and goods and services tax as required under the sale and purchase agreement.

[36] The appellant found support, *inter alia*, in the High Court case of *Dato' Yeoh Kian Hin v. Wijaya Astana Sdn Bhd & Ors* [2002] 1 CLJ 68.

[37] The respondent on the other hand argued that the actual intention to attach the application with the minutes of judgment sought is to ensure the final order can be finalised speedily, promptly and expeditiously. Learned counsel for the respondent further submitted that it is not necessary in all the cases to attach with the minutes for judgment sought and it is also not mandatory. Failure to include minutes is not fatal and curable under O. 2 r. 1 of the Rules of Court 2012. He relied on another High Court case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55; [1988] 2 MLJ 268.

[38] We had no quarrel with both authorities cited by learned counsel for both parties. In fact, we found *Sova Sdn Bhd*, *supra*, was referred to with approval in *Dato Yeoh Kian Hin*, *supra*. The following was what the learned judge in *Dato Yeoh Kian Hin*, *supra*, said:

> In my opinion the meaning of the word "minute" in *Bouvier's Law Dictionary* relied upon by Miss Ayleswary pertains to the "record" of the court proceedings, ie, what had transpired in court made by the judge or registrar in attendance in the form of handwritten notes whereas the word "minutes" found in O. 81 r. 2(2) refers to the orders or reliefs sought for but not yet granted or made by the court and are drafted and attached to the O. 81 summons as required by r. 2(2) on the supposition or assumption that the plaintiff's application will meet with the court's approval. The meaning of the word "minutes of the judgment or order" in the book "*Chancery Practice* (by Daniell's)" which was also relied upon by Miss Ayleswary means the minutes of a judgment or order already pronounced by the court.
>
> The rationale for such a requirement in respect of summary proceedings under O. 81 of the RHC could well have been to ensure that the final orders can be speedily, promptly and expeditiously issued by the court upon the termination of the proceedings in the applicant's favour. The judge is at liberty to grant or refuse to grant all or any one or more of the attached minutes of judgment. There could well be another important rationale for such a practice or requirement, ie to alert the applicant's opponent concerning the orders of reliefs sought for by the former and to overcome any ambiguity or vagueness in the summons so that the defendant will be able to respond effectively to the applicant's application and to prepare comprehensively his defence and to submit, accordingly, on the date of hearing.
>
> In *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268, the plaintiff sought for an order for specific performance of an agreement and alternatively a rescission of the said agreement and claimed damages and costs pursuant to O. 81 of the RHC. The defendant unsuccessfully tried

to have the plaintiff's application dismissed with costs for non-compliance with O. 81 r. 2(2) of the RHC by raising a preliminary objection. According to the defendant, there was a failure on the plaintiff's part to attach to its application the minutes of the judgment sought. Lim Beng Choon J (as His Lordship then was) held as follows:

> Turning to the second issue concerning the irregularity of the application, all I can say is that when the applicant is seeking the aid of Order 81 *there is an option either to set out the reliefs of the judgment sought by the plaintiffs (see Order 81 rule 2 of the Court of Judicature Act) and it is not mandatory that an application for Order 81 must in all cases have the minutes of the judgment sought for attached to the summons although in practice minutes of the judgment are normally attached to the summons. In any event the failure to attach the said minutes to the summons is in my view not fatal; it is curable under Order 2 rule 1 of the High Court Rules. I therefore cannot accede to the learned defence counsel's contention that the application made by the plaintiff is bad and therefore must be struck out*. (emphasis added)

I am of the respectful view that the above case is equally applicable to the facts of the instant case where the situation is reversed, ie the decree of specific view that the above case is performance is spelt out in the proposed minutes of the judgment attached to an O. 81 summons but not stated in the body of the O. 81 summons itself. I also find support for my views in the following excerpt from the Malaysian Court Practice - High Court:

ORDER 81

...

(81.1.1) Scope of order

This order provides a procedure similar to O. 14 and enables a plaintiff, where there is no triable defence to the action, to obtain summary judgment in an action for specific performance of a contract ... for the sale and purchase of (property) without having to proceed to a full trial ...

This order supersedes the old O. 14 of the repealed RSC 1957.

There are procedural differences between O. 81 and O. 14. The major ones are as follows:

(a) ...

(b) The summons under O. 81 must set out or have attached thereto minutes of judgment sought (see r. 2(2);

(c) ...

(d) ...

(e) ...

(81.1.3) Specific performance

...

To facilitate the order for specific performance, r. 2(2) requires the summons to set out or have attached thereto minutes of the judgment which the plaintiff seeks.

Normally, the first part of the order for specific performance would provide for the agreement to be specifically performed and the second part would encompass other necessary directions for performance which may relate to the terms and conditions of the agreement ...

[39] We had perused the reliefs sought by the respondent in the notice of application which for ease of reference are reproduced now as follows:

(i) Dekri Perlaksanaan Spesifik (Decree for Specific Performance) dikeluarkan terhadap Defendan untuk mengkehendaki menyempurnakan penjualan Hartanah yang dipegang di bawah HS(D) 460660 PTD 4036 Mukim Sungai Tiram, Daerah Johor Bahru, Negeri Johor;

(ii) Dekri Perlaksanaan Spesifik (Decree for Specific Performance) dikeluarkan terhadap Defendan untuk mengkehendaki menyempurnakan perjanjian penyewaan Hartanah yang dipegang di bawah HS(D) 460660 PTD 4036 Mukim Sungai Tiram, Daerah Johor Bahru, Negeri Johor;

(iii) Kaveat persendirian pihak Defendan yang didaftarkan di bawah nombor pendaftaran 16406/2016 dikekalkan sehingga penyelesaian dan keputusan tindakan ini;

(iv) Pendaftar Mahkamah Yang Mulia Ini adalah diberikuasa dengan sempurnanya untuk menandatangani Borang Permohonan untuk kebenaran dari Peguasa Negeri dan Borang Pindahmilik (Borang 14A Kanun Tanah Negara, 1965) dan lain-lain dokumen yang diperlukan;

(v) Sebagai alternative, Plaintif berhak untuk mendapatkan gantirugi sebagai gentian kepada dekri perlaksanaan spesifik;

(vi) Gantirugi untuk kerugian yang telah dialami berakibat dari kelewatan Defendan untuk menyempurnakan jualan dan penyewaan hartanah tersebut kepada Plaintif ditaksirkan dan dibayar oleh Defendan kepada Plaintif;

(vii) Plaintif berhak untuk menolak wang sebanyak RM114,000.00 sebagai deposit yang perlu dibayar mengikut perjanjian penyewaan sekiranya mendapati Defendan enggan melanjutkan dengan penyewaan daripada harga jualan hartanah tersebut;

(viii) Plaintif berhak untuk membuat permohonan lanjutan untuk menyempurnakan penjualan hartanah tersebut (sekiranya perlu);

(ix) Pengarah Tanah dan Galian Johor adalah perlu memberikan kesan yang sepenuhnya terhadap Perintah Spesifik Perlaksanaan tersebut bagi tujuan untuk mendapatkan kebenaran dari Penguasa Negeri dan juga memindahkan hartanah tersebut daripada Defendan kepada Plaintif;

A (x) Kos tindakan ini dibayar oleh Defendan kepada Plaintif berdasarkan pada peguamcara dan anakguam sebanyak RM50,000.00; dan

(xi) Lain-lain relif Mahkamah Yang Mulia Ini mendapati suai dan manfaat.

B **[40]** The rationale for such a requirement to set out the relief of the judgment sought to attach thereto minutes of judgment in respect of summary proceedings under O. 81 of the Rules of Court 2012 is to ensure that the final order can be speedily, promptly and expeditiously issued before the court upon the termination of the proceedings in the appellant's favour. See *Dato Yeoh Kian Hin*, *supra*. The order gives an option either to set out or to C attach the minutes. In this instant case, we found the respondent had sufficiently set out the reliefs of the judgment sought which were supported by the affidavit containing all the documents and details of parties' obligation under the agreement as shown in the reproduced prayers above. As alluded to before, the respondent in this instance was merely seeking the appellant D to continue with the execution of the agreement and to apply for the State Authority's approval. Prayer (viii) of the notice of application as reproduced above allows the respondent to seek for further order, if needs be. So this is not a case where the applicant "has put it into the hands of the court how the contract is to be carried out" as in the case of *Saudagar Singh v. Nazeer* E [1978] 3 AUER 817 (Ch D), another case cited by learned counsel for the appellant.

[41] Hence, we again agreed with learned counsel for the respondent and therefore answered the last issue in the negative.

F **Conclusion**

[42] In the premises of the aforesaid, we found there was no merit in this appeal. The appeal was therefore dismissed with costs and the order of the High Court was accordingly affirmed. We also ordered the deposit to be refunded to the appellant.

G

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